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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO.

INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.)

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner above named respectfully prays this Court for a writ of certiorari directed to the United States Court of Appeals for the Fourth Circuit, to the end that this Court may review the decision which the said Court of Appeals has rendered in the above-entitled case. And the Petitioner respectfully shows to the Court:

The Opinion of the Court Below

The decision of the United States Court of Appeals for the Fourth Circuit is reported at 208 F 2d 87.

Jurisdiction of this Court

Jurisdiction to review, through the procedure of certiorari, the decision of the Court of Appeals in this case is conferred upon this Court by the provisions of Title 28, United States Code, Section 1254 (formerly 28 U. S. C. 347) and Title 29, United States Code, Section 160 (Section 10 (e) of the National Labor Relations Act, as amended).

Statement of the Case

This case arises out of the following circumstances. The Petitioner operates a textile plant in the Town of Rock Hill, South Carolina. During the Spring and Summer of 1951 the Petitioner's employees at this Plant engaged in a strike extending over a period of approximately four months. It is agreed, however, by the Union which filed the charge initiating this case (49)[1] and by the Labor Board's Trial Examiner (B. A. 6) and by the Labor Board itself (1, B. A. 1) that: — "It is undisputed that the strike was an economic one, neither induced nor prolonged by employer unfair labor practices."

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[1]Unless otherwise indicated all page references are to the printed appendix to the Company's Brief in the Court of Appeals. References to portions of the record printed in the Appendix to the Board's Brief in the Court of Appeals are designated "B. A." Any references to portions of the written transcript not printed in either appendix are designated "Tr."

The strike involved such tension and turmoil as often accompany a contest of this nature. Yet from the beginning to the end of the entire matter, there is no evidence, and no claim whatever, of any anti-union utterance or action on the part of the Company, or any representative of its management or any of its supervisors.

At the conclusion of the strike the Petitioner took back to work all of its one thousand fifty-seven employees except twenty-one. No violation of the Act has been found in the Petitioner's failure to reinstate these twenty-one, except as to one of them. The Petitioner's failure to take back into its employment this individual, one Matthew Stallings, is the sole subject of the present petition.

It is undisputed that for a number of years the Petitioner has had collective bargaining contracts with the Union; that the great bulk of the Petitioner's employees were Union adherents; that at the end of the strike, as stated above, the Petitioner took practically all of them back to work (Tr. 43); that "among those reinstated or offered reinstatement were all, or substantially all, of the forty-three employees who at the time were officers, shop committeemen or stewards of the Union" (B. A. 7); and that the employee in question, Matthew Stallings, had not been a leader in the strike or in the Union in any way.

As to the Petitioner's failure to reinstate Stallings, the Trial Examiner, whose findings and rulings were adopted in their entirety by the Board, specifically declared (7):—"we must forget anti-union motivation, for I do not think there is (any). There might have been some inference, but if there is, it escaped me."

During the strike, among other incidents of like nature, there were a great number of instances of automobile tires being punctured by roofing nails or tacks

strewn in the public street at and adjacent to the entrance to the Petitioner's premises (10). During the course of these incidents, the Petitioner was informed by Highway Patrolmen of the State of South Carolina that they had caught Matthew Stallings, the employee above named, in the act of strewing such nails or tacks in the street; and on this account the Petitioner refused to take Stallings back to work at the end of the strike (B. A. 5, 10).

At the hearing before the Board's Trial Examiner the Petitioner presented evidence which, it contended, clearly established that Stallings had in fact engaged in the misconduct referred to above. The Petitioner further pointed out that even if it should be found that Stallings had not engaged in such misconduct, still it was clear, and indeed conceded on all sides, that the Petitioner reasonably and in good faith believed that Stallings had done so, and was motivated in its refusal to re-employ him *purely and solely* by this good faith belief. The Petitioner, therefore, contended that since concededly it had acted out of no motive and for no purpose condemned by the Statute, it could not be found guilty of violating the Statute in failing to take Stallings back to work.

The Board made a finding that Stallings had not committed the acts which the State Patrolmen testified they saw him commit. The Board thereupon went on to rule that Stallings was entitled to his job with the Petitioner *absolutely and as a matter of law*, even though the Petitioner had been guilty of no other unfair labor practice in any way related to the matter and even though the Petitioner had not acted out of any anti-union or anti-concerted-activity motives in denying employment to Stallings. The Court below affirmed this ruling, noting, however, that it involved "an interesting and important question of law."

Question Involved

The question presented is essentially this:—Does the National Labor Relations Act make any guarantee *of a job* to an employee? Does not the Act rather guarantee to the employee that he *shall not be discriminated against on account of any Union or concerted activity on his part?* Does not the Act simply guarantee to the employee that his employer shall take *no action against him which involves any anti-union or anti-concerted-activity consideration or objective on the part of the employer?*

Reasons Why Certiorari Should Be Granted

1. This case involves a question which is of general importance in the administration of the National Labor Relations Act.

2. The decision below represents a fundamental misconception as to the nature, purpose and scope of the National Labor Relations Act.

3. The decision below if projected into future rulings and decisions and not corrected, will result in basic distortion of the National Labor Relations Act.

4. The decision below is contrary to a decision of the United States Court of Appeals for the Fifth Circuit on the same subject, and such conflict should be resolved.

WHEREFORE, upon all of the foregoing and upon the reasoning and authority set forth in the brief annexed hereto, the Petitioner earnestly prays the Court to grant certiorari in this case to the end that this Court may review the decision which has been rendered by the Court below.

Industrial Cotton Mills
(Division of J. P. Stevens & Co., Inc.)
Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO.

INDUSTRIAL COTTON MILLS (DIVISION OF J. P. STEVENS & CO., INC.)

Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Reference to the Opinion of the Court Below, Jurisdiction of This Court and Statement of the Case

There is hereinabove set forth, in the Petition for Writ of Certiorari, reference to the opinion of the Court below and to the statutory authority for this Court's jurisdiction to review the lower Court's decision, together with a statement as to the facts and circumstances of this case.

Specification of Error

The Petitioner assigns as error the lower Court's upholding of the order, which the Board has issued against the Petitioner, directing the Petitioner to reinstate Matthew Stallings into its employment and pay back wages to him and post "cease and desist" notices throughout its Plant.

ARGUMENT

I

It Should be Noted in The First Place, That The Evidence Strongly Tends to Establish That Stallings Did Engage in The Misconduct Attributed to Him.

The Labor Board concedes, of course, that if Stallings did commit the wrongful acts which the Petitioner understood he committed, then the Board had no grounds to complain of the Petitioner's failure to take him back to work at the end of the strike (Board's Brief in Court of Appeals p. 16). Although the Board made a finding that Stallings had not engaged in misconduct, and the Court below accepted such finding, it would seem worthwhile and pertinent to review briefly the evidence on this.

As hereinabove indicated, two Highway Patrolmen of the State of South Carolina testified positively and unequivocally that Stallings did deliberately throw nails or tacks in the street at one of the entrances to the Petitioner's premises; that they each saw him do it; and immediately took him into custody for doing so (11, 14, 15).

These officers were in no way connected with the Petitioner; their veracity was in no way impeached and their account of the matter not in any respect shaken on

cross-examination. Just why the Board saw fit completely to reject their testimony it is difficult to understand—the burden having been admittedly on the Board (Board's Brief in Court of Appeals p. 16) "to prove by a preponderance of the evidence" that Stallings had not misconducted himself, as the Petitioner had been informed he had.

In taking this view the Board seems to have relied on its own declaration or assertion that Stallings was not "formally" arrested (Board's Brief in Court of Appeals p. 5). The officers testified, however, that Stallings was placed under arrest (12, 15). The Board's counsel himself asked the Board's witness, Mrs. Lucy Starnes, if she was in the vicinity where Stallings "was arrested" and where she was standing "at the time of his arrest" (45), and if she saw him "arrested" (45). In her replies Mrs. Starnes stated that she did see Stallings "when they arrested him" (45).

One of the officers told of Stallings being given a paper directing him to appear before a local Judge (12); and Stallings himself testified that he received a legal paper from "the Magistrate" (3). It is true that Stallings was never tried in Court, but neither were various others whom the Petitioner refused to take back to work on account of misconduct on their part during their strike and as to whom the Board finds no grounds of complaint against the Petitioner.

The Board relied on Mrs. Starnes as a "disinterested" witness who "corroborated in detail" Stallings' testimony that he did not throw the nails or tacks (Board's Brief in Court of Appeals p. 4, 18). Mrs. Starnes' testimony was that on the occasion in question she went to the entrance to the Petitioner's premises because "the

crowd usually got out there about that time to jeer at the ones that went in to work" (46) and that "some of them had been slapping some" and "calling one another names" and that she "just went to see what was going to happen out there" (46-47); that she looked around "over both crowds" but did not watch Stallings "in particular" and didn't know, of course, what he might have been doing when she was "not looking at him" (47, 48). It is indeed difficult to see why the Board preferred this negative and inconclusive testimony to the affirmative and specific testimony of the officers that they *did see* Stallings throw the nails and tacks.

Having upon it the admitted burden of proving by the preponderance of the evidence (Board's Brief in Court of Appeals p. 16 and 29 U. S. C. A. 160 (c)) that Stallings did not engage in the misconduct in question, it is submitted that the Board did not, upon the record outlined above, sustain such burden and that the Court below erred in holding that the Board had done so.

II

In Any Event, the Board Was Without Power to Direct the Petitioner to Employ Stallings, Since it Was Established, and Indeed Conceded, That the Petitioner Had No Anti-Union and No Anti-Concerted-Activity Intent or Purpose Whatever in Denying Employment to Stallings.

Whether Stallings did engage in misconduct or did not engage in misconduct, there is no evidence and no claim that the Petitioner refused employment to him *because of* his participating in any activity of any nature protected

by the Act. It is true, of course, that he went on strike, as did hundreds of other employees, and stood in the picket lines, as they did. If his doing this or his engaging in any phase of unionism or union activity had been the reason, or an ulterior reason, for the Petitioner's denying work to him, then the Petitioner would have been in violation of the Act.

But it is undisputed, and expressly conceded[2] by the Board (Tr. 215, Board's Brief in Court of Appeals p. 10, 13-15) that *the true reason, the whole reason* and *the only reason* why the Petitioner denied employment to Stallings at the end of the strike was a good faith acceptance by the Petitioner of the report that Stallings had strewn nails or tacks at the entrance to the Plant. For the Petitioner to have denied employment to Stallings because of this report, and *for no reason whatever except this report*, was not a violation of the Act, regardless of whether this report be now held to have been incorrect or not.

This would, of course, not be true if the strike here had been an unfair labor practice strike. Likewise, even though this was, as the Board admits, purely an "economic" strike, still if there were any element in the situation from which it could be inferred that the Petitioner's explanation for refusing employment to Stallings was but a pretext and that in truth and reality it denied

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[2]The Board could hardly do otherwise then so concede in view of the fact, as noted above, that there is no claim of Stallings being any sort of leader in the Union or in the strike; that hundreds of employees were, as he was, members of the Union; that they, like he, went on strike and stood in the picket lines—but were, all of them, unhesitatingly taken back to work by the Petitioner, including among them all of the committeemen, stewards, officers and leaders of the Union.

him employment because of his being a member of the Union, or because of his going on strike, or because of his taking part in picketing—or if there were in the case any evidence of any sort from which it could be concluded that the ultimate truth of the matter was that the Petitioner acted against Stallings because of considerations or purposes inhibited by the Statute—then, and in such case, the Petitioner would have been in violation of the law. But it being absolutely clear, as the Board admits, that the Petitioner did not in truth and in reality act out of any such considerations, the law has not been violated.

The Board and the Court below disregarded these fundamental principles and adopted instead this far-reaching proposition (Board's Brief in Court of Appeals p. 11-15; B. A. 16; 8)—that in case of an economic strike, if a striker whose job has not been filled and who has not been guilty of misconduct is, upon returning to work, denied employment, then his employer is violating the Statute, *absolutely and as a matter of law* — even though it be not shown or claimed that the denial was for anti-union or anti-concerted-activity reasons and even though it be conceded indeed that the denial of employment was not for such reasons. It is respectfully submitted that this represents a basic misconception at the Statute and is thoroughly erroneous.

Nowhere and under no circumstances does the Statute entitle any person to employment, or guarantee a job to him, apart from anti-union or anti-concerted-activity actions on the part of an employer. Where no such employer actions are shown, and are indeed conceded to be completely absent from the picture, the Labor Board has no power whatever to grant or restore employment

to anybody. It has always been emphasized by the Courts, and indeed by the Board itself, that an employer may take action against an employee for any cause or reason, good or bad, *correct or erroneous,* grounded or groundless, provided only that the employer does not act *because of* the employee's engaging in union or concerted activity.

In *Rubin Brothers Footwear vs. National Labor Relations Board,* the United States Court of Appeals for the Fifth Circuit recognized the fundamental nature and import of this principle and expressly rejected the ruling which the Court below has accepted. The Court of Appeals for the Fifth Circuit said:

> ". . . It is perfectly plain that Examiner and Board tried and determined the case as to her on the same *incorrect theory* followed in the Rawlins' case, that Dean *as a striking employee had a right to be reinstated,* and that the Petitioners must, therefore, show that she had forfeited that right. Having voluntarily left Petitioners' employ to go out on strike, she had the right and *only the right,* if she applied before she was replaced, not to be refused reinstatement *merely because she had gone out on strike or for any other union activity.*" (Emphasis supplied).
>
> *Rubin Brothers Footwear vs.*
> *National Labor Relations Board,*
> 203 F2d 486, 488 (C. A. 5)

In the present case the Board concedes that the Petitioner did not act against Stallings *because of* his belonging to the Union, nor *because of* his going on strike, nor *because of* his being a picket, nor *because of* his en-

gaging in any other union or concerted activity.[3] Therefore, the Board had no power whatever to direct the Petitioner to give employment to Stallings.

The Board has itself so held in the past.

> "To the extent that our dissenting colleague relies on the *Fafner* case as standing for the Proposition that, subject to certain conditions not here present, a striking employee has an absolute right to be reinstated to his job, we feel that he is in error. For clearly, the *'right of a striker to be re-employed* upon the re-opening of the plant or the termination of the strike,' referred to in the *Fafner* case, *can be construed to mean only that a striker may not be denied work for discriminatory reasons.*" (Emphasis supplied).
>
> *National Grinding Wheel Co., Inc.*
> 75 NLRB No. 112; 21 L. R. R. M. 1095

The matter may be analyzed in this manner. In the action which the employer takes, what is he in truth striking at? If the target which he is in truth seeking to hit be not a thing protected by the Statute, then he is not violating the Statute—even though it be later proved that he was mistaken in thinking that such target was present. The target which the employer here was genuinely striking at was the strewing of nails and tacks. The strewing of nails and tacks is not a thing protected by the Statute. Therefore, the Petitioner was not violating

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[3]In this connection it will be noted upon reading the "cease and desist" notice which the Petitioner has been ordered to post, how unrelated and inapplicable the language of the notice is to the actions of the Petitioner in this case (B. A. 33).

the Statute—even though it be now found that the strewing of nails and tacks was, in this instance, absent.

Thus, it is submitted that the Board and the Court below seriously erred in adopting the view that it is immaterial that the Petitioner "may have acted in good faith" (Board's Brief in Court of Appeals p. 14), and may have been free of any "animus" (Board's Brief in Court of Appeals p. 15), and was "not activated by opposition to the employees protected activities" (Board's Brief in Court of Appeals p. 15). The true and governing principle is fundamentally, specifically and precisely to the contrary.

The Court below has heretofore recognized this.

> "We do not lose sight of the fact that our inquiry is centered upon the *motivating cause* of the employer's action . . . Aware of the burden of proof that is imposed upon the Board in proving the employer's dominant *motivation* in discharging the employee, cf. *National Labor Relations Board vs. Remington Rand, Inc.*, supra, 94 F2d, at page 872, we are of the opinion that the evidence advanced to support this finding of discrimination is not substantial." (Emphasis supplied).
>
> *Martel Mills Corporation vs.*
> *National Labor Relations Board,*
> 114 F2d 624, 631, 632 (C. A. 4)

This Court has clearly pointed out that in such cases the crux of the matter is the motive and purpose behind the employer's act. And from *National Labor Relations Board vs. Jones & Laughlin Steel Corp.*, 301 U. S. 1 to the very recent cases of *Radio Officers Union,*

et al *vs. National Labor Relations Board* this Court has held:

> "That Congress intended *the employer's purpose in discriminating to be controlling* is clear."
>
> *Radio Officers Union*, et al *vs. National Labor Relations Board* ..... U. S. ..... ; 33 L. R. R. 27 (February 1, 1954)

> "The Statute does not preclude a discharge on the ostensible grounds for the Petitioner's action; it forbids discharge for what has been found to be the *real motive* of the Petitioner." (Emphasis supplied).
>
> *The Associated Press vs. National Labor Relations Board,* 301 U. S. 103, 132; 81 L. Ed. 960

> ". . . It is found that . . . the action taken by the Respondent was *with the purpose* to discriminate against those most active in the Union." (Emphasis supplied).
>
> *National Labor Relations Board vs. Mackay Radio & Telegraph Company,* 304 U. S. 333, 347; 82 L. Ed. 1391

It is submitted that all cases involving issue as to whether a termination of employment has or has not violated the Act turn on this inquiry:—What was the employer's *true purpose* — what was his *real motive* — in severing the employment?

It has never been denied that this is the test in determining whether an employer has violated the Act

in discharging a working employee.[4] Yet paradoxically, in the present case, it is held that the employer has greater duty to a striking employee than to a working employee.

For example, if an employer genuinely believes that a working employee has damaged a piece of machinery in his Plant and discharges the employee *purely and solely on this account*, it is clear that the Labor Board cannot require the reinstatement of the employee—no matter that the employer is proved to have been mistaken in his belief. Likewise, if the employer genuinely believes that a striking employee, while standing on a picket line, has damaged a piece of the employer's machinery or equipment outside the Plant and discharges the employee *purely and solely on this account*, is it not equally beyond the Labor Board's authority to require reinstatement of the employee—no matter that the employer is proved to have been mistaken in his belief?[5] Is there any reason in law

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[4]Indeed good faith and proper motive have always been held to be the ultimate test, not only as to whether an employer has violated Section 7 and 8 (a) (3) of the Statute in acting against employees with respect to their employments, but also as to whether an employer has violated Section 8 (a) (5) of the Statute in failing or refusing to deal with representatives of employees. See, for example, *National Labor Relations Board vs. James Thompson & Co.*—F2d —(C. A. 2); C. C. H. Labor Cases p. 84, 944.

[5]The law is, of course, that an unreplaced striker, during an "economic" or non-unfair labor practice strike, remains an employee in precisely the same sense that he would be an employee if at work during a time of no strike.

> "If there was a current labor dispute, the men were still employees by virtue of Section 2 (3), and the refusal to let them work was a discharge."
>
> *National Labor Relations Board vs. Mackay Radio & Telegraph Company*, 304 U. S. 333, 349; 82 L. Ed. 1392

or logic why the Board should have jurisdiction and power in the latter case and not in the former?

In the past, in a decision already quoted in part above, the Board considered this exact question and sharply rejected the anomaly which it and the Court below have now embraced in the instant case.

> "To the extent that our dissenting colleague relies on the *Fafner* case as standing for the proposition that, subject to certain conditions not here present, a striking employee has an absolute right to be reinstated to his job, we feel that he is in error. For clearly, the *'right of a striker to be re-employed* upon the re-opening of the plant or the termination of the strike', referred to in the *Fafner* case, *can be construed to mean only that a striker may not be denied work for discriminatory reasons. Otherwise, a striker would have more job security than a working employee* who, in the language of the Supreme Court (*Associated Press vs. National Labor Relations Board,* 301 U. S. 103, 132, see also *National Labor Relations Board vs. Mackay Radio & Telegraph Company,* supra) may be discharged for any reason other than Union activity or agitation for collective bargaining." (Emphasis supplied).
>
> *National Grinding Wheel Co., Inc.,*
> 75 NLRB No. 112; 21 L. R. R. M. 1095

The Court below seems to rest its decision essentially upon the thought that the Act does not "expose the innocent employee to the hazard of his employer's mistake" and that:

> "As between the victim of the mistake and the person who made the mistake, it seems just that the

perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it."

. . .

"In that light, the superior equities would seem to lie with the injured but innocent employee. Balancing the conflicting social interests here involved, we believe the dominant interest to be subserved, at the expense of the servient interest which must be sacrificed, is the interest of the employee."

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The clear, positive and unassailable answer to this is that it is not the function of the Labor Board or the Courts, under the National Labor Relations Act, to weigh equities, nor correct employer mistakes, nor shift the burden of employer errors, but to ferret out and remedy anti-union and anti-concerted-activity discriminations on the part of employers. There is no provision in the Statute which protects employees from being unjustly or unreasonably or mistakenly acted against by their employer. The Statute simply prohibits employers from acting against employees for anti-union or anti-concerted-activity reasons.

There are undoubtedly many misfortunes which employees suffer as a result of mistakes and mistaken beliefs on the part of their employers. Absent, however, the unlawful aim and purpose which is prohibited by the National Labor Relations Act, that Act does not purport

either to punish or to correct such mistakes. In holding otherwise the Court below, it is respectfully submitted, has inadvertently written a broad and radical enlargement into the Act.

Upon all of the foregoing, the Petitioner earnestly prays the Court to review the decision which the Court below has rendered in this case.

Respectfully submitted,

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Of Counsel:
PIERCE AND BLAKENEY

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